TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~374.~~ 161

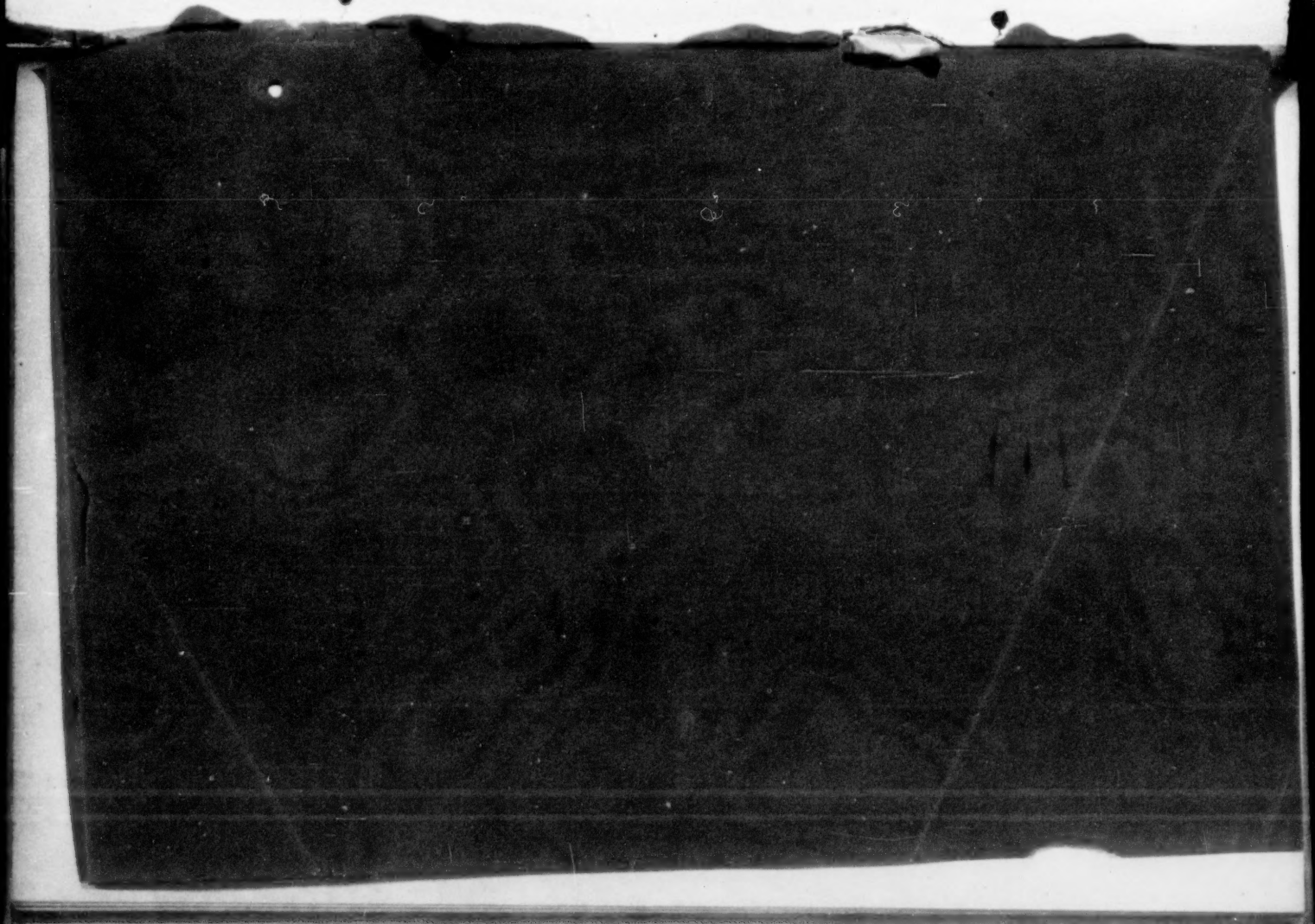
THE PROVIDENCE WASHINGTON INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

LEHMAN HUCHBERGER, BENJAMIN HUCHBERGER, AND MOSES HUCHBERGER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED DECEMBER 13, 1869.



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before the circuit court of Cook County on the first day of the next term thereof, to be holden at the court-house in Chicago, in said county
4 of Cook, on the third Monday in June next, to answer unto Lehman Huchberger, Benjamin Huchberger, and Moses Huchberger in a plea of trespass on the case, on promises, to the damage of the said plaintiffs, as is said, in the sum of six thousand dollars.

And have you there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness William L. Church, clerk of our said court, and the seal thereof, at Chicago, this 16 day of May, A. D. 1867.

[L. S.] W'M L. CHURCH, *Clerk.*

Upon which writ the sheriff of said county afterwards, to wit, on the 17th day of May, A. D. 1867, made the following return, to wit:

Sheriff's return.

Served the within writ on The Providence Washington Insurance Company, by reading the same and delivering a copy thereof to T. L. Miller, agent of said company, this 17th day of May, 1867. President of said company not found in this county.

J. L. BEVERIDGE, *Sheriff,*
By C. G. AYERS, *Deputy.*

5 *Fees.*

Service	$0 50
Copy	50
Miles	10
Return	10
	$1 20

Paid by plaintiff's attorney.

And afterwards, to wit, on the 17th day of June, in the year last aforesaid, said The Providence Washington Insurance Company filed its petition to remove said suit into the circuit court of the United States for the northern district of Illinois; which petition is in the words and figures following, to wit:

Petition.

STATE OF ILLINOIS, *Cook County, ss:*

To the Honorable Erastus S. Williams, judge of the circuit court of Cook County:

The petition of The Providence Washington Insurance Company of Providence, respectfully showeth that, on or about the 16th day of May, A. D. 1867, Lehman Huchberger, Benjamin Huchberger, and Moses Huchberger commenced in this honorable court an action at law
6 by summons against your petitioner; that thereupon summons issued out of this honorable court, directed to the sheriff of Cook County, commanding said sheriff to summon your petitioner, if your petitioner should be found within the county of Cook, to be and appear in this honorable court, on the third Monday of June next, to answer the plaintiffs in a plea of trespass on the case upon promises, to the

damage of the said plaintiffs in the sum of six thousand dollars; which summons was served in due course on your petitioner's agent at said county.

And your petitioner further showeth unto this honorable court that the said Lehman Huchberger, Benjamin Huchberger, and Moses Huchberger are citizens and residents of the said State of Illinois; that your petitioner, the said Providence Washington Insurance Company of Providence, is a corporation created and existing under and by virtue of the laws of the State of Rhode Island, one of the United States of America; that the principal place of business of your petitioner
7 is in the city of Providence, and State of Rhode Island; that your petitioner's president, vice-president, [vice-president,] secretary, and principal officers and managers are citizens and residents of the State of Rhode Island aforesaid; that the matter in dispute between the said Lehman Huchberger, Benjamin Huchberger, and Moses Huchberger and your petitioner exceeds the sum and value of five hundred dollars, exclusive of costs.

And your petitioner further represents that your petitioner is ready and willing to give good and sufficient surety for the entering in the circuit court of the United States for the northern district of Illinois, on the first day of its next session, copies of said process against your petitioner, and also for the appearance of your petitioner in said court. And your petitioner does hereby offer as surety for the purposes aforesaid Timothy L. Miller, a resident and citizen of the county and State aforesaid.

Wherefore your petitioner prays that this honorable court will
8 be pleased to order that copies of the process aforesaid be made at the cost of your petitioner, and that the said cause be removed to the said circuit court of the United States for the northern district of Illinois, and that this honorable court proceed no further in said cause.

[L. S.] PROV. WASHINGTON INS. CO.,
JOHN KINGSBURY, *Pres't.*

STATE OF ILLINOIS, *Cook County, ss:*

Timothy L. Miller, being duly sworn, deposes and says that he is the agent and attorney in fact of the above-named petitioner, The Providence Washington Insurance Company; that he has read the foregoing petition, knows the contents thereof, and that the matters and things therein stated and set forth are true in substance and fact.

TIMOTHY L. MILLER.

Subscribed and sworn before me this 14th day of June, A. D. 1867.

R. P. BLANCHARD,
Notary Public.

And afterwards, to wit, at the June term of said court, to wit, on the 18th day of June, in the year aforesaid, an order was made in
9 said cause in the words and figures following, to wit:

Order of removal.

LEHMAN HUCHBERGER, BENJAMIN HUCHBERGER, and Moses Huchberger *vs.* THE PROVIDENCE WASHINGTON INSURANCE Company.	27, 549, 2007.—Assumpsit.

This day came the said defendant by Mr. Sansum, one of its attorneys,

before the circuit court of Cook County on the first day of the next term thereof, to be holden at the court-house in Chicago, in said county
4 of Cook, on the third Monday in June next, to answer unto Lehman Huchberger, Benjamin Huchberger, and Moses Huchberger in a plea of trespass on the case, on promises, to the damage of the said plaintiffs, as is said, in the sum of six thousand dollars.

And have you there this writ, with an endorsement thereon in what manner you shall have executed the same.

Witness William L. Church, clerk of our said court, and the seal thereof, at Chicago, this 16 day of May, A. D. 1867.

[L. S.] W'M L. CHURCH, *Clerk.*

Upon which writ the sheriff of said county afterwards, to wit, on the 17th day of May, A. D. 1867, made the following return, to wit:

Sheriff's return.

Served the within writ on The Providence Washington Insurance Company, by reading the same and delivering a copy thereof to T. L. Miller, agent of said company, this 17th day of May, 1867. President of said company not found in this county.

J. L. BEVERIDGE, *Sheriff,*
By C. G. AYERS, *Deputy.*

5 *Fees.*

Service	$0 50
Copy	50
Miles	10
Return	10
	$1 20

Paid by plaintiff's attorney.

And afterwards, to wit, on the 17th day of June, in the year last aforesaid, said The Providence Washington Insurance Company filed its petition to remove said suit into the circuit court of the United States for the northern district of Illinois; which petition is in the words and figures following, to wit:

Petition.

STATE OF ILLINOIS, *Cook County, ss:*

To the Honorable Erastus S. Williams, judge of the circuit court of Cook County:

The petition of The Providence Washington Insurance Company of Providence, respectfully showeth that, on or about the 16th day of May, A. D. 1867, Lehman Huchberger, Benjamin Huchberger, and Moses Huchberger commenced in this honorable court an action at law
6 by summons against your petitioner; that thereupon summons issued out of this honorable court, directed to the sheriff of Cook County, commanding said sheriff to summon your petitioner, if your petitioner should be found within the county of Cook, to be and appear in this honorable court, on the third Monday of June next, to answer the plaintiffs in a plea of trespass on the case upon promises, to the

damage of the said plaintiffs in the sum of six thousand dollars; which summons was served in due course on your petitioner's agent at said county.

And your petitioner further showeth unto this honorable court that the said Lehman Huchberger, Benjamin Huchberger, and Moses Huchberger are citizens and residents of the said State of Illinois; that your petitioner, the said Providence Washington Insurance Company of Providence, is a corporation created and existing under and by virtue of the laws of the State of Rhode Island, one of the United States of America; that the principal place of business of your petitioner
7 is in the city of Providence, and State of Rhode Island; that your petitioner's president, vice-president, [vice-president,] secretary, and principal officers and managers are citizens and residents of the State of Rhode Island aforesaid; that the matter in dispute between the said Lehman Huchberger, Benjamin Huchberger, and Moses Huchberger and your petitioner exceeds the sum and value of five hundred dollars, exclusive of costs.

And your petitioner further represents that your petitioner is ready and willing to give good and sufficient surety for the entering in the circuit court of the United States for the northern district of Illinois, on the first day of its next session, copies of said process against your petitioner, and also for the appearance of your petitioner in said court. And your petitioner does hereby offer as surety for the purposes aforesaid Timothy L. Miller, a resident and citizen of the county and State aforesaid.

Wherefore your petitioner prays that this honorable court will
8 be pleased to order that copies of the process aforesaid be made at the cost of your petitioner, and that the said cause be removed to the said circuit court of the United States for the northern district of Illinois, and that this honorable court proceed no further in said cause.

[L. S.] PROV. WASHINGTON INS. CO.,
JOHN KINGSBURY, *Pres't.*

STATE OF ILLINOIS, *Cook County, ss:*

Timothy L. Miller, being duly sworn, deposes and says that he is the agent and attorney in fact of the above-named petitioner, The Providence Washington Insurance Company; that he has read the foregoing petition, knows the contents thereof, and that the matters and things therein stated and set forth are true in substance and fact.

TIMOTHY L. MILLER.

Subscribed and sworn before me this 14th day of June, A. D. 1867.

R. P. BLANCHARD,
Notary Public.

And afterwards, to wit, at the June term of said court, to wit, on the 18th day of June, in the year aforesaid, an order was made in
9 said cause in the words and figures following, to wit:

Order of removal.

LEHMAN HUCHBERGER, BENJAMIN HUCHBERGER, and Moses Huchberger *vs.* THE PROVIDENCE WASHINGTON INSURANCE Company.	27, 549, 2007.—Assumpsit.

This day came the said defendant by Mr. Sansum, one of its attorneys,

and filed its petition for the removal of said cause to the next circuit court of the United States within and for the northern district of Illinois; and the same having been heard and considered, and the court being fully advised in the premises, and the said defendant offering Timothy L. Miller as its surety for entering in the said circuit court of the United States on the first day of next session a copy of the process in said cause and for appearing therein and answering the complaint of said plaintiffs, which surety is accepted by the court, it is therefore ordered by the court that the said plaintiff do no further prosecute their suit in this court, and that the same may be removed into the said circuit court of the United States according to the act of Congress in such case made and provided, and is further ordered that the defendant pay the costs of said cause in this court.

I, William L. Church, clerk of the circuit court of Cook County, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect, and complete copy of the process, petition, and proceedings as the same remain of record in my office in a certain cause lately pending in said court, on the common-law side thereof, wherein Lehman Huchberger et al. were plaintiffs and The Providence Washington Insurance Company was defendant.

In witness whereof I have hereunto set my hand and affixed the seal of said court, at Chicago, this twenty-fourth day of June, A. D. 1867.

[SEAL.] W'M L. CHURCH, *Clerk.*

[5-c't rev. stamp cancelled.]

Endorsed: Filed June 25, 1867.

W'M H. BRADLEY, *Clk.*

On this day, to wit, the first day of July, A. D. 1867, there was filed in said clerk's office the original declaration heretofore filed in said entitled cause; which said declaration is in the words and figures following, to wit:

Declaration.

In the circuit court of Cook County, of the June term, A. D. 1867.

STATE OF ILLINOIS, *County of Cook, ss:*

The Providence Washington Insurance Company was summoned to answer Lehman, Huchberger, Benjamin Huchberger, and Moses Huchberger, in a plea of trespass on the case upon promises.

And thereupon the said Lehman Huchberger, Benjamin Huchberger, and Moses Huchberger, plaintiffs in this suit, by McAllister, Jewett & Jackson, their attorneys, complain of The Providence Washington Insurance Company, defendants, for that whereas the said defendants heretofore, to wit, on the twenty-seventh day of September, in the year of our Lord one thousand eight hundred and sixty-six, at Providence, to wit, at Chicago, in the county aforesaid, on the application of said plaintiffs, made and delivered to the said plaintiffs, a certain policy of insurance in writing, whereby they, the said defendants, in consideration of thirty dollars to them in hand paid by the said plaintiffs, the receipt whereof was thereby acknowledged, did insure the said plaintiffs against loss or damage by fire to the amount of four thousand dollars on their stock of staple and fancy dry goods and Yankee notions,

contained in the four-story brick building, situate No. 173 Lake street, in the city of Chicago aforesaid. And the said defendants, for the consideration aforesaid, did, in and by the said policy, promise and agree to make good unto the said plaintiffs, their executors, administrators, and assigns, all such loss or damage, not exceeding in amount the said sum of four thousand dollars, as should happen by fire to the property therein and hereinabove specified, from the 27th day of September, A. D. 1866, (at 12 o'clock at noon,) until the full end and term of one year thence next ensuing, (which term was to expire on the 27th day of September, A. D. 1867, at noon,) the said loss and damage, to be
13 estimated according to the true and actual value of the property at the time such loss or damage should happen, and to be paid within sixty days after notice and proof thereof made by the said plaintiffs. It was, however, provided in said policy that the said defendants shall have the right to replace the said lost or damaged property with other of like kind and quality within ninety days after having received notice of such loss or damage. And it was in said policy agreed and understood that any survey, plan, and description of the property herein and thereby insured, to which reference is made in the written portion of the policy, shall be deemed and taken as a warranty on the part of the said plaintiffs; and a false statement by the said plaintiffs, or an omission to make known any facts mentioned to the hazard of the risk, shall render this policy void. And it was also provided that, if the situation of the property or the circumstances affecting the risk shall be, during the time of the said policy or renewal of
14 the same, altered or changed by or through the advice, consent, or agency of the said plaintiffs, so as to increase the risk thereby assumed, or if the said property shall be sold or conveyed in whole or in part, or if this policy shall be assigned without the consent of this company, or if any other insurance has been, or shall be hereafter, made upon said property, or any part thereof, for the use and benefit of said plaintiffs, without the knowledge or consent of the said defendants, the said policy should be thereby rendered void; and also it was provided that, in case of loss or damage to the above-mentioned property, the said defendants shall be liable for no greater portion thereof than the amount thereby insured shall bear to the whole insurance on said property. It was furthermore agreed upon in said policy of insurance that, in case of loss or damage by fire, the said plaintiffs should give immediate notice thereof to the said defendants, and as soon after as possible render a particular account of such loss or damage, signed with their own hands,
15 and verified by their oath or affirmation, and also, if required, by their books of accounts or other proper vouchers. It was further provided that they, the said plaintiffs, should declare on oath whether any and what other insurance has been made on said property, and procure a certificate under [under] the hand of a magistrate or notary public contiguous to the place of the fire, and not interested in the loss, that he is acquainted with the character and circumstances of the assured; and that, having investigated the circumstances in relation to such loss, doth know or verily believe that said assured really, and by misfortune and without fraud or evil practice, have sustained by such fire loss and damage to the amount therein mentioned; and until such proofs, declarations, and certificates are produced, the loss shall not be payable. It was furthermore provided that, if there appear any fraud or false swearing, the said plaintiffs shall forfeit all claim by virtue of this policy. It was also agreed in said policy that, in case of any differ-
16 ence of opinion between the parties thereto, the subject may be

referred to the judgment of arbitrators to be mutually chosen, whose award in writing shall be binding on said parties. It was also provided that no action or suit against the said defendants, for the recovery of any claim upon, under, or by virtue of the said policy, shall be sustainable in any court of law or chancery unless the same shall be commenced within twelve months next after the occurrence of the loss or damage upon which such claim is based. Furthermore, it was provided that the said defendants will not be liable for damage to property by lightening, or the bursting or collapse of steam boilers, pipes, or flues, unless fire ensues, and, in such case, only for the damage caused by fire; nor is the said defendant liable for any loss or damage by fire which may happen by invasion, insurrection, public enemies, riots, civil commotions, or any military or usurped power whatever. It was also agreed and understood, in and by the said policy, that bills of ex-
17 change, notes, accounts, and evidences or securities of property of any kind, books, wearing apparel, furniture, plates, money, jewels, medals, paintings, sculpture, and curiosties, are not covered by the aforesaid policy unless particularly mentioned. Goods held in trust on commision, or on storage, are to be assured specifically as such; otherwise the policy of insurance will not cover such property. It was further provided that this insurance may be terminated at any time at the request of the said plaintiffs, in which case the said defendants shall retain only the customary short rates for the time the policy has been in force. It was also stipulated and agreed upon that the aforesaid insurance may be terminated at any time at the option of the said defendants, on giving notice to this effect and refunding a rateable portion of the premium for the unexpired term of the said policy. It was further provided that this insurance shall not be considered valid until countersigned by T. L. Miller, agent of said defendants, The Prov-
18 idence Washington Insurance Company.

And the said plaintiffs further aver that at the time of making of said policy of insurance, and from thence until the loss or damage hereinafter mentioned, they had an interest in said insured property to a large amount, to wit, to the amount of all the money and more by them insured thereon, to wit, at Chicago aforesaid; and that afterwards, to wit, on the second day of March, A. D. 1867, the said property in the said policy of insurance mentioned was burnt, consumed, and destroyed by fire, which did not happen or take place by means of any invasion, insurrection, riot, or civil commotion, or of any military or usurped power whatsoever; whereby the said plaintiffs sustained damage to a large amount, to wit, at Chicago, in the county aforesaid.

And the said plaintiffs further say that no false statements or omissions to make known any facts, material to the hazard, were made by the said plaintiffs. And the said plaintiffs further allege and say that the situation of the property and the circumstances affecting the risk
19 have not been altered or changed during the continuance of the said policy of insurance by the advice or consent of the said plaintiffs, so as to increase the risk thereby assumed; nor has the property been sold or conveyed, in whole or in part, since the making of aforesaid policy; nor has the said property been assigned without the consent of the said defendants; nor has any other insurance been obtained upon said property, or any part thereof, for the use and benefit of said plaintiffs, without the consent and knowledge of the said defendants. And the said plaintiffs aver that the written consent of the said defendants for other insurance was obtained, and mentioned and contained in said policy of insurance. And the said plaintiffs furthermore

aver that the said defendants are not held liable for an amount greater in proportion to the whole amount of insurance on aforesaid property than agreed upon.

The said plaintiffs further allege and say that they forthwith,
20 after the said loss, to wit, on the 4th day of March, A. D. 1867, gave notice thereof to the said defendants; and as soon thereafter as possible, to wit, on the 13th day of March, A. D. 1867, at Chicago, in the county aforesaid, did deliver to the said defendants as particular an account of their loss and damage as the nature of the case would admit, signed by the said Lehman Huchberger for the said plaintiffs, and accompanied with his oath or affirmation. And a certificate was procured under the hand of a notary public, contiguous to the place of the fire and not interested in the loss, stating that he is acquainted with the character and circumstances of the said plaintiffs; and that, having investigated the circumstances in relation to such loss, doth know or verily believe that said plaintiffs really, and by misfortune and without fraud or evil practice, have sustained by such fire loss and damage to the amount therein mentioned. And the plaintiffs aver that said
21 account was delivered to the said defendant, and the said defendant retained the same without objection thereto, and waived all objections to the same.

The said plaintiffs allege that there was no fraud or false swearing; the plaintiffs say that the subject was not referred to arbitrators; and they say that this action is brought within twelve months after the occurrence of the loss upon which said claim is based. Furthermore, the said plaintiffs allege that the loss or damage was not caused by lightening, pipes, or flues, except fire ensued.

And the said plaintiffs further aver that although they have in all things observed, performed, and fulfilled all and singular the matters and things which on their part were to be observed, performed, and fulfilled, according to the form and effect of said policy of insurance; and although they have sustained loss and damage on occasion of said fire to a large amount, to wit, to the amount of four thousand dollars; yet the said defendants have not paid to the said plaintiffs the
22 said sum of money so by the said defendants insured as aforesaid, or repaid or reimbursed the said loss sustained by the said fire aforesaid, and although often so requested, or any part thereof, but the sum so insured as aforesaid, and the said loss, and every part thereof, still remains wholly in arrear and unpaid, contrary to the form and effect of the said policy of insurance so by the said defendants in that behalf made as aforesaid, and to which, when produced and proved, the said plaintiffs beg leave to refer.

And also for that whereas the said defendants heretofore, to wit, on the twenty-seventh day of September, A. D. 1866, at Providence, to wit, at Chicago, in the county aforesaid, on the application of the said plaintiffs, made a certain other policy of insurance in writing, whereby the said defendants, in consideration of thirty dollars to them in hand paid by the said plaintiffs, the receipt whereof was thereby acknowledged, did insure the said plaintiffs against loss or damage by fire to the amount of four thousand dollars on their stock of staple and fancy dry goods
23 and Yankee notions, contained in the four-story brick building situate No. 173 Lake street, in the city of Chicago aforesaid. And the said defendants, for the consideration aforesaid, did, in and by the said policy, promise and agree to make good and satisfy unto the said plaintiffs, their executors, administrators, and assigns, all such loss or damage not exceeding in amount the said sum of four thousand dollars

as should happen by fire to the property therein and herein above specified from the 27th day of September, A. D. 1866, (at 12 o'cl'k at noon,) until the full end and term of one year thence next ensuing, (which term was to expire on the 27th day of September, A. D. 1867, at noon,) the said loss and damage to be estimated according to the true and actual value of the property at the time such loss or damage should happen, and to be paid within sixty days after notice and proof thereof made by the said plaintiffs. It was, however, provided in said policy that the said defendants shall have the right to replace the said lost or damaged property with other of like kind and quality within ninety days
24 after having received notice of such loss or damage. And the said plaintiffs aver that the said proposals, surveys, plans, conditions, and rates in the said policy referred to were and are in all respects the same as those set forth and contained in the first count therein above set out, as by the said policy of insurance, and the proposals, conditions, and special rates thereto annexed, will, when produced, more fully appear, reference being thereto had.

And the said plaintiffs aver that, at the time of the making of said policy of insurance as aforesaid, and from thence until the loss and damage hereinafter mentioned, the said plaintiffs had an interest in the said insured property to a large amount, to wit, to the amount of all the money insured thereon, to wit, at Chicago aforesaid; and that afterwards, to wit, on the 2nd day of March, A. D. 1867, the said property in the said insurance mentioned was burnt, consumed, and destroyed by fire, which did not happen or take place by means of any event or circumstance or cause against which the said defendants had by special agreements and conditions in aforesaid policy exempted them-
25 selves from liability as insurers of the said property.

And the said plaintiffs aver that they, and each of them, have in all things observed, performed, and fulfilled all and singular the matter and things, conditions and stipulations, which on their part were to be observed, performed, and fulfilled, according to the form and effect of said policy of insurance. And although loss and damage on occasion of said fire have been sustained to a large amount, to wit, to the amount aforesaid, & yet the said defendants have not paid the said sum of money so by them insured as aforesaid, or repaid or reimbursed the said loss sustained by the said fire as aforesaid, although often requested so to do, or any part thereof, but the sum so insured as aforesaid, and the said loss, and every part thereof, still remains wholly in arrear and unpaid, contrary to the form and effect of the said policy of insurance so by the said defendants in that behalf made as aforesaid, to the damage of the said plaintiffs of six thousand dollars.

And therefore they bring suit, &c.

McALLISTER, JEWETT & JACKSON,
Pl'ffs' Att'ys.

26 Endorsed: Filed June 7, 1867.

W'M L. CHURCH, *Cl'k.*

Filed July 1, 1867.

W'M H. BRADLEY, *Cl'k.*

On this day, to wit, the third day of July, A. D. 1867, came said defendant by Wilder & Sansum, its attorneys, and filed its plea of general issue in said clerk's office in the above-entitled cause; which said plea of general issue is in the words and figures following, to wit:

General issue.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

United States circuit court for the northern district of Illinois, July term, A. D. 1867.

PROVIDENCE WASHINGTON INSURANCE COMPANY
ads.
LEHMAN HUCHBERGER, BENJAMIN HUCHBERGER, and Moses Huchberger.

27 And the said defendant, by Wilder and Sansum, its attorneys, comes and defends the wrong and injury, when, &c., and says that it did not undertake and promise in manner and form as the said plaintiffs have in their declaration thereof complained against it; and of this it puts itself upon the country, &c.

WILDER & SANSUM,
Atty's for Def't.

And the said plaintiffs as to the said plea of the said defendant, wherein it puts itself upon the country, say that they do the like, &c.

McALLISTER, JEWETT & JACKSON,
Pl'ffs' Att'ys.

Endorsed: Filed July 3d, 1867.

W'M H. BRADLEY, *Cl'k.*

On this day, to wit, the third day of July, in the July term, A. D. 1867, of said court, in the record of the proceedings thereof in the above-entitled cause is the following entry, to wit:

Order.

LEHMAN HUCHBERGER ET AL.
vs.
THE PROVIDENCE WASHINGTON INSURANCE Company. } Assumpsit.

28 On motion of the defendant by its attorney, leave is given it to file amended pleas by Tuesday morning next.

On this day, to wit, the thirty-first day of July, in the July term, A. D. 1868, of said court, in the record of the proceedings thereof in the above-entitled cause is the following entry, to wit:

Order.

LEHMAN HUCHBERGER, BENJAMIN HUCHBERGER, and Moses Huchberger
vs.
THE PROVIDENCE WASHINGTON INSURANCE Company. } Assumpsit.

On motion of the defendant, by O. B. Sansum, esq., its attorney, leave is given to cross-examine Joseph Frank and Lewis Frank, witnesses,

whose depositions have been taken on the part of the plaintiffs and filed herein, by giving reasonable notice to the plaintiffs or their attorneys of the time and place of taking such depositions.

On this day, to wit, the twenty-fourth day of June, in the May
29 term, A. D. 1869, of said court, on the record of the proceedings thereof in the above-entitled cause is the following entry, to wit:

Order:

LEHMAN HUCHBERGER, BENJAMIN HUCHBERGER, and Moses Huchberger
vs.
THE PROVIDENCE WASHINGTON INSURANCE Company.
} Assumpsit.

Now come the parties by their attorneys, and upon issue joined thereupon came a jury of good and lawful men, to wit, O. B. Cheeseboro, B. Butler, Walter Buchanan, Joseph Boyd, James Bennett, Henry G. Gabel, H. R. Gardiner, Archibald McAllister, S. W. Lee, Wesley Polk, J. A. Kingsbury, and Elisha Chapman, who were all duly elected, tried, and sworn well and truly to try said issue; and, after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

On this day, to wit, the twenty-fifth day of June, in the May term, A. D. 1869, of said court, in the record of the proceedings thereof
30 in the above-entitled cause is the following entry, to wit:

Order.

LEHMAN HUCHBERGER, BENJAMIN HUCHBERGER, and Moses Huchberger
vs.
THE PROVIDENCE WASHINGTON INSURANCE Company.
} Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empannelled and sworn; and, after hearing additional evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

On this day, to wit, the twenty-sixth day of June, in the May term, A. D. 1869, of said court, in the record of the proceedings thereof in the above-entitled cause is the following entry, to wit:

Order.

LEHMAN HUCHBERGER, BENJAMIN HUCHBERGER, and Moses Huchberger
vs.
THE PROVIDENCE WASHINGTON INSURANCE Company.
} Assumpsit.

31 Now come again the parties by their attorneys, and now come also the jury in this behalf empannelled and sworn; and, after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until Monday morning next.

On this day, to wit, the twenty-eighth day of June, in the May term, A. D. 1869, of said court in the record of the proceedings thereof in the above-entitled cause is the following entry, to wit:

Order.

LEHMAN HUCHBERGER, BENJAMIN HUCHBERGER, and Moses Huchberger
vs.
THE PROVIDENCE WASHINGTON INSURANCE Company.
} Assumpsit.

Now come again the parties by their attorneys, and now come also the jury in this behalf empannelled and sworn; and, after hearing
32 the concluding arguments of counsel and receiving the instructions of the court, the jury retired to consider of their verdict, and after a short absence the jury returned into court the following verdict to wit: "We, the jury, find the issue for the plaintiffs, and assess their damages to the sum of four thousand five hundred and seven dollars and ninety-two cents." And thereupon the defendant, by its attorneys, moves the court for a new trial herein.

On this day, to wit, the thirtieth day of June, in the May term, A. D. 1869, of said court, in the record of the proceedings thereof in the above-entitled cause is the following entry, to wit:

Judgment.

LEHMAN HUCHBERGER, BENJAMIN HUCHBERGER, and Moses Huchberger
vs.
THE PROVIDENCE WASHINGTON INSURANCE Company.
} Assumpsit.

Now come the parties by their attorneys, and now comes on to be heard the motion of the defendant heretofore entered herein for
33 a new trial of this cause; and, after hearing the arguments of the defendant's counsel, the court overrules said motion. And thereupon the defendant, by its attorney, moves the court in arrest of judgment, which is overruled by the court.

It is thereupon considered and adjudged by the court that the said plaintiffs do have and recover of the said defendant the said sum of forty-five hundred and seven dollars and ninety-two cents, their damages so as aforesaid assessed, together with their costs and charges by them about their suit in this behalf expended, amounting to the sum of sixty-eight dollars and eighty-nine cents; and that they have execution therefor.

34 On this day, to wit, the ninth day of July, A. D. 1869, came said The Providence Washington Insurance Company, and filed in said clerk's office the bond for appeal in the above-entitled cause; which said bond for appeal is in the words and figures following, to wit:

Appeal bond.

In the circuit court of the United States, northern district of Illinois.

THE PROVIDENCE WASHINGTON INSURANCE COMPANY, plaintiff in error,
vs.
LEHMAN HUCHBERGER, BENJAMIN HUCHBERGER, and Moses Huchberger, defendants in error.

Know all men by these presents that we, The Providence Washington Insurance Company of Providence, Rhode Island, plaintiff in error, as principal, and Timothy L. Miller, of the city of Chicago, in the
35 county of Cook and State of Illinois, as surety, are held and firmly bound unto Lehman Huchberger, Benjamin Huchberger, and Moses Huchberger, of the city of Chicago, in the penal sum of six thousand dollars, lawful money of the United States, to be paid to the said Lehman, Benjamin, and Moses; for the payment of which, well and truly to be made, we bind ourselves, our executors, administrators, heirs, successors, and assigns, jointly, severally, and firmly by these presents.

Witness our hands and seals this third day of July, in the year of our Lord one thousand eight hundred and sixty-nine.

Whereas the above-named Providence Washington Insurance Company hath prosecuted a writ of error to the Supreme Court of the United States to reverse a certain judgment rendered by the circuit court of the United States for the northern district of Illinois on the thirtieth day of June, in the year of our Lord one thousand eight hundred and sixty-nine, at the May term thereof, in a certain cause
36 wherein the above-named Lehman Huchberger, Benjamin Huchberger, and Moses Huchberger were plaintiffs, and the said Providence Washington Insurance Company was defendant, for the sum of four thousand five hundred and seven dollars and ninety-two cents, besides costs of said suit:

Now, therefore, the condition of this obligation is such, that if the said Providence Washington Insurance Company shall prosecute the said writ of error with effect, and moreover pay the amount of said judgment, with interest, costs, and damages rendered, and to be rendered, against it in case the said judgment shall be affirmed in said Supreme Court of the United States, then the above obligation to be null and void; otherwise it shall be and remain in full force and virtue.

JOHN KINGSBURY, [SEAL.]
Pres't. Prov. Wash. Ins. Co.
T. L. MILLER. [SEAL.]

In presence of—
CHARLES P. CHAPIN.

Approved:

THOMAS DRUMMOND.

Endorsed: Filed July 9th, 1869.

W'M H. BRADLEY, *Clk.*

37 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, hereby certify the above and foregoing to be a true,

correct, and complete transcript of the record of all the proceedings had in said court in said entitled cause, wherein Lehman Huchberger, Benjamin Huchberger, and Moses Huchberger are plaintiffs, and The Providence Washington Insurance Company is defendant, as the same appears of record remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court at my office in the city of Chicago, in said district, this first day of November, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the 94th year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

[Five-cent internal revenue stamp affixed and canceled.]

38 Circuit court of the United States, northern district of Illinois.

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because, in the record and proceeding, as also in the rendition of a judgment in a plea which is in the said court before you, between Lehman Huchberger, Benjamin Huchberger, and Moses Huchberger, plaintiffs, and The Providence Washington Insurance Company, defendant, a manifest error hath happened, to the great damage of the said Providence Washington Insurance Company, as by its complaint appears; and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the

39 Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next in the said Supreme Court, to be then and there held, that the record and proceedings being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Hon. Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this second day of July, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the ninety-third year.

[SEAL.] W'M H. BRADLEY, *Clerk.*

(Indorsed:) Circuit court U. S., northern district of Illinois. Lehman Huchberger et al. vs. Providence Washington Insurance Company. Writ of error.

40 By the Honorable Thomas Drummond, one of the judges of the circuit court of the United States for the northern district of Illinois, in the seventh circuit.

To Lehman Huchberger, Benjamin Huchberger, and Moses Huchberger:

Whereas The Providence Washington Insurance Company has lately appealed to the Supreme Court of the United States from a judgment lately rendered in the circuit court of the United States for the northern district of Illinois, made in favor of you, the said Lehman Huchber-

ger, Benjamin Huchberger, and Moses Huchberger, and has filed the security by law required in the premises; you, the said Lehman Huchberger, Benjamin Huchberger, and Moses Huchberger, therefore, are cited to be and appear before the Supreme Court at the city of Washington, in the District of Columbia, on the sixth day of December next, to do and receive what may appertain to justice to be done in the premises.

Given under my hand at the city of Chicago, in the northern district of Illinois, in the seventh circuit, the 29th day of October, in the year of our Lord one thousand eight hundred and sixty-nine, and of our independence the ninety-fourth.

THOMAS DRUMMOND.

41 NORTHERN DISTRICT OF ILLINOIS, *ss:*

Otto A. Wehle, being duly sworn, saith that he served the within citation on the appellee Benjamin Huchberger on the 29th day of October, A. D. 1869, and on the appellees Lehman Huchberger and Moses Huchberger on the 30th day of October, A. D. 1869, by delivering a copy thereof to each of the said appellees personally at Chicago, in the district aforesaid.

OTTO A. WEHLE.

Subscribed and sworn before me this 30th day of Oct., 1869.

E. S. DRUMMOND,
U. S. Com.

(Indorsed:) Huchberger et al. vs. Providence Washington Insurance Co. Citation.

(Indorsement on cover:) No. 374. The Providence Washington Insurance Company, plaintiff in error, vs. Lehman Huchberger, B. Huchberger, and Moses Huchberger. N. Illinois C. C. U. S.

Filed 14th December, 1869.

UNITED STATES OF AMERICA,
DISTRICT OF COLUMBIA. } ss.

IN THE

Supreme Court of the United States,

December Term, A. D. 1870.

PROVIDENCE, WASHINGTON, INSURANCE COMPANY,
Plaintiffs in Error,
vs.
LEHMAN HUCHBERGER, BENJAMIN HUCHBERGER, AND MOSES HUCHBERGER,
Defendants in Error.

Error from the Northern District of Illinois.

BRIEF FOR PLAINTIFFS IN ERROR,

BY O. B. SANSUM.

UNITED STATES OF AMERICA, } ss.
DISTRICT OF COLUMBIA. }

IN THE

Supreme Court of the United States,

December Term, A. D. 1870.

PROVIDENCE, WASHINGTON, INSURANCE COMPANY,
Plaintiffs in Error,
vs.
LEHMAN HUCHBERGER, BENJAMIN HUCHBERGER, AND MOSES HUCHBERGER,
Defendants in Error.

Error from the Northern District of Illinois.

BRIEF FOR PLAINTIFFS IN ERROR.

This case comes up upon the declaration and pleas made by the respective parties in the Court below.

Plaintiffs in Error moved the Court below to arrest the judgment, and the question now presented is, whether the judgment ought to be arrested,—whether the declaration is sufficient in law, after verdict, for the Defendants in Error to maintain their judgment.

There are but two counts in this declaration. In the first all the terms and conditions upon which the contract to insure was made are specifically set out. In the second, and following the Plaintiffs in Error's agreement to insure, the declaration proceeds: "And the said plaintiffs aver that the said proposals, surveys, plans, conditions and rates in the said policy referred to were and are in all respects the same as those set forth and contained in the first count therein above set out."

In both counts the plaintiffs in the Court below declared upon a contract to insure them "*against loss or damage by fire to the amount of four thousand dollars on their stock of staple and fancy dry goods and Yankee notions, contained in the four story brick building situate No.* 173 *Lake Street, in the city of Chicago, from the* 27*th day of September, A. D.* 1866, *at twelve o'clock noon, until the full end and term of one year thence next ensuing, which term was to expire on the* 27*th day of September, A. D.* 1867, *at noon*, the said loss to be estimated according to the true and actual value of the property at the time such loss or damage should happen, and be paid within sixty days after notice and proof thereof made by the said plaintiffs. It was, however, provided in said policy, that the said defendants shall have the right to re-place the said lost or damaged property with other of like kind and quality within ninety days after having received notice of such loss or damage. * * * It was further provided that this insurance shall not be considered valid until countersigned by T. L. Miller, Agent of said defendants.

I.

The Court will readily perceive that the contract is to insure goods of a certain description in a certain place for one year, to wit.: from the 27th of September, 1866, to the 27th of September, 1867. And to entitle Defendants in Error to maintain the judgment, should not the declaration show, upon its face by proper averments that within the term and at the particular place mentioned in the contract, the goods mentioned in the contract were lost or damaged by fire?

And what is the averment upon that question?

Following the averment of interest in the property insured, the declaration reads: "And that afterwards, to wit: on the second of March, A. D. 1867, the said property in the said policy of insurance mentioned was burnt, consumed and destroyed by fire, which did not happen or take place by means of any invasion," &c. &c.

As to where the goods were burnt, consumed and destroyed by fire, the declaration is silent;—as to whether a fire ever happened in 173 Lake Street, Chicago, the declaration is silent.

II.

And what is the averment as to the provision in the contract mentioned, viz.: "This insurance shall not be considered valid until countersigned by T. L. Miller, Agent?"

Not one word.

It is a general rule in pleading that the declaration must show a title in the plaintiff, or the Court will arrest the judgment.

III.

The contract provides for payment of damages; to be made in money sixty days after notice and proof thereof, with the right to the Plaintiffs in Error to re-place the goods lost or damaged within ninety days after notice of the loss. And now what are the averments upon this question?

The declaration avers notice of the loss on the 4th of March, 1867.

The record shows that on the 16th day of May, A. D. 1867, plaintiffs in the Court below commenced this action, seventy-three days after notice of the loss, and seventeen days before the right to sue accrued.

It is submitted that the action is premature. An action does not lie before a cause of action accrued; and if it be not pleaded in Abatement, yet if it appears upon the record it may be moved in arrest of judgment. (*Comy. Dig. Tit. Action E; Rushton* vs. *Aspinwall Doug.* 679; 9 *Wh.* 595.

For these reasons the judgment ought to be arrested.

O. B. SANSUM,
For Plaintiffs in Error.

ROBERT HERVEY, *of Counsel.*

IN THE

Supreme Court of the United States.

DECEMBER TERM, 1870.

THE PROVIDENCE WASHINGTON INS. CO.
vs.
LEHMAN HUCHBERGER AND OTHERS. } *No.* 161.

THE MERCHANTS' INSURANCE COMPANY
vs.
LEHMAN HUCHBERGER AND OTHERS. } *No.* 162.

THE ARCTIC INSURANCE COMPANY
vs
LEHMAN HUCHBERGER AND OTHERS. } *No.* 163.

IN ERROR TO NORTHERN DISTRICT OF ILLINOIS.

BRIEF OF DEFENDANTS IN ERROR.

The records in all these cases are similar, and the defendants the same; they therefore file the same brief in each case. The actions are assumpsit on policies of fire insurance issued by the respective plaintiffs in error. Declarations in the usual form, plea of the general issue in each case, and in No. 163 several special pleas on which issues of fact were joined, jury trial in each case, and verdict for defendants in error. Motions for new trial and in arrest of judgment made and overruled in each case, and judgment entered in favor of defendants in error in case No. 161 for $4,507.92, in case 162 for $2,718.75, and in case 163 for $7,306.63. There is no bill of exceptions in either case.

The sufficiency of the declaration in each case to sus-

tain the judgment therein is now called in question, and is the only ground of complaint of plaintiffs in error.

1st. It is objected that the declaration in neither of the cases alleges *where* the goods were burned. But each declaration does allege that the insurance was "on the stock of staple and fancy dry goods and Yankee notions contained in the four-story brick building situate No. 173 Lake street, in the city of Chicago," and that "the said property in the policy of insurance mentioned was burnt," &c., which is sufficiently specific; the inference from the allegations made clearly being that the goods were burned in the building where they were insured; but if they were not, the declaration in this respect is as specific as the policy of insurance: if the one does not allege where the goods were burned, neither does the other limit the liability to a burning at any particular place.

2d. It is objected that neither declaration alleges that the policy of insurance was signed by the agent of the company.

No such allegation was necessary. The agent himself may have issued and delivered the policy, which would dispense with his signature; or his signature may have been waived by the company. It was no more necessary to allege that the policy was signed by the agent than by the president and secretary of the company. The declaration alleges that the Insurance Company "made and executed to the plaintiffs a certain policy of insurance in writing, whereby," &c., and this was sufficient. If not executed so as to bind the company, it was not the instrument declared on, and plaintiffs must have failed in their proof. In point of fact the policy was countersigned by the agent, as appears from a copy set out in one of the declarations. After verdict, the court will presume that every material fact inferrible from what is alleged was proved on the trial.

3d. It is objected to the declaration in No. 161 that the action was prematurely brought

If such were the case, the objection could only be taken advantage of by plea.

The Insurance Company agreed by the terms of their policy to pay for any loss at the expiration of sixty days from its occurrence and notice thereof. The declaration shows that more than sixty days transpired before the action was brought. The liability of the company was then fixed. If the company desired to avoid payment of the money by replacing the goods destroyed, that was matter of defence to be shown by the company.

The days alleged in the declaration under a *verdict* as those on which the goods were burned and the notice given are not material, and different days may have been proved on the trial, and the court will presume that such proof was given, if necessary to sustain the judgment.

4th. It is objected to the declaration in No. 163 that there is neither consideration nor promise alleged in the first count. This is immaterial. Other counts contain those allegations, and if there be one good count it is sufficient, even on general demurrer. (1 Chitty's Pleading, 659.)

It being apparent from the character of the objections in these cases that the writs of error were prosecuted merely for delay, the defendants in error pray the court to award them damages, as provided by the rules of court in such cases.

LYMAN TRUMBULL,
For Defendants in Error.

Supreme Court of the United States.

DECEMBER TERM, 1870.

PROVIDENCE WASHINGTON INSURANCE COMPANY, Plaintiffs-in-Error,
vs.
LEMAN HUCHBERGER *et al.*, Defendants-in-Error. } No. 161.

THE MERCHANTS INSURANCE COMPANY, Plaintiff-in-Error,
vs.
LEMAN HUCHBERGER *et al.*, Defendants-in-Error. } No. 162.

THE ARCTIC INSURANCE COMPANY, Plaintiff-in-Error,
vs.
LEMAN HUCHBERGER *et al.*, Defendants-in-Error.

Supplemental Brief for Plaintiffs-in-Error.

In connection with the brief heretofore presented in these cases, the counsel for the plaintiffs-in-error asks the attention of the Court to the following authorities:

Glover vs. Buck, 24 Wend., 153.
Worsley vs. Wood, 6 Term R., 719–722.
5 Hemp., 56.
3 Hening, 456.
6 Cranch, S. C. U. S., 221.
Pet. C. C. R., 476.
6 Bosw., N. Y. 23.

Where any fact is necessary to be proved at the trial, the declaration must contain an averment substantially of the fact, in order to let in the proof.

U. S. Bank vs. Smith, 11 Wheaton, 172–5.
5 McLean, 441.
17 Johns., 458.

After verdict, everything shall be intended which the allegations in the declaration required to be proved.

3 Term R., 25.

~~ROBERT HERVEY~~,
Of Counsel for Plaintiffs-in-Error.